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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re MARTIN S., a Person Coming Under
the Juvenile Court Law

THE PEOPLE,

Plaintiff and Respondent,

v.

MARTIN S.,

Defendant and Appellant.

G039714

(Super. Ct. No. DL029167)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard E. Behn, Judge. Affirmed.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Ronald Jakob and Jennifer A. Jadovitz, Deputy Attorneys General, for Plaintiff and Respondent.

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THE COURT:^{*}

At a disposition hearing held on December 17, 2007, the court found defendant unlawfully possessed a dirk or dagger pursuant to Penal Code section 12020, subd. (a)(4); possessed marijuana pursuant to Health and Safety Code section 11357, subd. (b); and possessed burglary tools (a shaved key, or what is commonly known as a “G-ride” key), pursuant to Penal Code section 466.¹ Defendant was declared a ward of the court pursuant to Welfare and Institutions Code section 602, and was placed on probation with credit for 34 days served in juvenile hall or other appropriate facility.

On appeal defendant makes the following arguments: (1) the court erroneously denied his motion to suppress evidence he possessed a burglary tool or a “G-ride key,” and (2) the evidence was insufficient to support the court’s finding he possessed a dirk or dagger. We disagree, and affirm the judgment.

I

Factual and Procedural Background

Possession of a Dirk or Dagger

On July 14, 2007, at about 8:52 p.m., Officer Daniel Ackerman (Ackerman) responded to a dispatch call in an area of Buena Park, CA, well-known for its gang activity. Upon arrival, Ackerman observed defendant and another youth kneeling behind a wall.

^{*} Before Rylaarsdam, Acting P.J., Fybel, J., and Ikola, J.

¹ The People filed three separate petitions. The first petition filed on September 14, 2007, alleged defendant unlawfully possessed marijuana, and a dirk or dagger. The second petition filed on September 18, 2007, alleged defendant received stolen property. This petition was dismissed on the court’s own motion. The third petition filed on October 3, 2007, alleged defendant possessed burglary tools.

At first glance, it appeared to Ackerman that the two youths were committing some type of vandalism. However, as Ackerman approached them, he observed they were actually lighting candles behind the wall. Gang members were known to congregate at this wall because it served as a make-shift shrine or memorial to a fellow gang member who had been murdered in the area during the past year.

Ackerman asked defendant if they could talk. Defendant responded “Yes.” Defendant then walked over to Ackerman. Ackerman asked defendant if he could perform a body search or “pat down” of his body. Defendant said he could do so. The pat down search revealed the presence of a modified screw driver with a pointed edge in defendant’s right front pant pocket, and marijuana cigarettes in another pocket.

Ackerman asked defendant if his friend knew he had the screwdriver. Defendant said “No.” Ackerman then asked defendant why he had the screwdriver, and he replied, “Come on man, you know why.” At that point defendant was handcuffed, and taken to the police station.

Possession of a Burglary Tool or “G-Ride Key”

On August 9, 2007, at about 8:39 p.m., Officer Andy Luong (“Luong”) and his partner were performing a “pedestrian check” in the same area of Buena Park where the makeshift gang shrine was located. Luong was checking out the people in the area because of frequent complaints involving pedestrian loitering, as well as break-ins of vehicles and property.

While driving in his patrol car, Luong recognized defendant from previous contacts, and stopped his vehicle. Luong and his partner emerged from the car, and approached the area where defendant was sitting by himself. Luong testified the patrol vehicle did not have on its overhead lights, and that he parked the vehicle in a nearby driveway so that defendant’s ingress or egress was not affected in any way.

As Luong exited his patrol car, his weapon remained in its holster. When he was about two to three feet from where the defendant was sitting, Luong asked him in

what he described as a “normal voice,” what he was doing in the area. Defendant replied he was “hanging out.” Luong then asked defendant if he was carrying anything that he [Luong] should be concerned about. Defendant replied that he had a “G-ride key” in his possession. Luong was aware that a “G-ride key” was the street term for a shaved key that was commonly used to break into cars or to steal them.

Luong then asked defendant if he could search him, and defendant replied, “Go ahead.” Luong found a blank key that looked like it had been ground down on both sides to remove indentations so that it could be placed in an ignition. Luong detained defendant, and he was taken into custody.

II

Discussion

The Trial Court Properly Denied Defendant’s Motion to Suppress

Defendant contends the trial court erred in denying his motion to suppress. He argues he was unreasonably detained by Officer Luong. He further argues that the consent he gave to Luong permitting the search was invalid because it was involuntary. We disagree with defendant’s contentions. We conclude Luong did not detain defendant, and that the encounter between them was consensual. Moreover, we conclude defendant’s consent to the search was given voluntarily.

The Motion to Suppress

Defendant filed a motion to suppress the “G-ride key” pursuant to Welfare and Institutions Code section 700.1.

The evidence related to the motion was garnered through the testimony of Officer Luong.² After Luong’s testimony was complete, counsel began to argue various

² In defendant’s written notice of motion to suppress, the “quasi-form” motion indicated counsel intended to raise the following issues: “There was insufficient justification for initiating the detention of the minor[;] . . . [t]he detention of the minor

points regarding the motion. Counsel first argued that in order to detain defendant, the police were required to have specific, articulable facts in which to do so. Almost immediately after counsel began her argument, the court interjected with the remark, “Okay. I have been doing this for 35years; I understand all that. Tell me what he [the officer] did wrong here.”

In response to the court’s query, counsel replied that Luong’s version of the events was unreliable because his follow-up report had been generated two months after the events occurred, and Luong’s version of the events “. . . just didn’t make sense.” Counsel further argued defendant was “detained” by Luong’s approach and subsequent questioning, and by the time defendant told Luong he was just “hanging out,” the situation had developed into a full-blown “fishing expedition.” Counsel also remarked had Luong asked defendant if he had anything on him that “could hurt [his] safety,” she would have expected a gun or knife to be involved, “not a key.”

The court interjected again, and admonished counsel she had misstated the officer’s testimony, as well as the defendant’s response. The court advised counsel the evidence established that upon approaching the defendant, Luong asked him, “Do you think you have anything that I should be concerned about?” To which defendant replied, “I have a G-ride key.”

At this point, the court denied the motion to suppress. The court found Luong had the right to be in the area, and to approach the defendant and to ask him questions, i.e., if he possessed anything that Luong should be concerned about. Moreover, once defendant responded that he possessed a “G-ride key,” Luong had the obligation to detain him because he had committed a crime.

was unduly prolonged beyond the time requisite to investigate the matters which rendered the initial detention permissible[;] . . . [t]he arrest of the minor was based on information unlawfully obtained[,] and the [m]inor was unlawfully interrogated in violation of *Miranda v. Arizona* (1966) 384 U.S. 436, and/or voluntariness principles.” ~(**C.T. pp. 29-30.**)~

There was no Waiver

At the outset, the People contend defendant waived his right to argue the trial court improperly denied his motion to suppress on the basis if defendant detects a critical gap in the prosecution's proof or a flaw in its legal analysis, he must object on that basis to admission of the evidence, or risk forfeiting the issue on appeal. (*People v. Williams* (1999) 20 Cal.4th 119, 130.)

The People complain the argument defendant makes on appeal is a different argument than the one he raised below. The People contend that during the motion hearing, defendant argued that Luong had no right to conduct the search because he did not state he was concerned for his safety. However on appeal, the People contend defendant argues the search was improper because he was unlawfully detained for investigatory purposes, and there was no valid consent.

Upon review, we conclude there was no waiver. Defendant's rather formulaic motion to suppress listed as one of its grounds, that the search was based on an unlawful detention. Also, despite the fact counsel's argument *was* somewhat belabored, we conclude that had it not been for the court's series of interjections before counsel was able to effectively respond, that counsel's argument concerning unlawful detention might have been more thoroughly raised. And, lastly, in order to avoid any future ineffective assistance of trial counsel claim, we address the challenge.

In any event, however, the fact no waiver presents itself is of little effect. For, as we ultimately conclude, defendant's argument fails.

Standard of Review

“The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts

so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]’ [Citation.]” (*People v. Weaver* (2001) 26 Cal.4th 876, 924.)

The Encounter was Consensual

Based on the record before us, we conclude there was no detention. Rather, the encounter between Luong and defendant was consensual.

The law pertaining to police contacts with individuals has been thoroughly explained by the California Supreme Court in *In re Manual G.* (1997) 16 Cal.4th 805, 821. In *In re Manual G.*, the Court concluded: “The United States Supreme Court has made it clear that a detention does not occur when a police officer merely approaches an individual on the street and asks a few questions. [Citation.] As long as a reasonable person would feel free to disregard the police and go about his or her business, the encounter is consensual and no reasonable suspicion is required on the part of the officer. Only when the officer, by means of physical force or show of authority, in some manner restrains the individual’s liberty, does a seizure occur. [Citation.] ‘[I]n order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers’ requests or otherwise terminate the encounter.’ [Citation.] This test assesses the coercive effect of police conduct as a whole, rather than emphasizing particular details of that conduct in isolation. [Citation.] Circumstances establishing a seizure might include any of the following: the presence of several officers, an officer’s display of a weapon, some physical touching of the person, or the use of language or of a tone of voice indicating that compliance with the officer’s request might be compelled. [Citations.] The officer’s uncommunicated state of mind and the individual citizen’s subjective belief are irrelevant in assessing whether a seizure triggering Fourth Amendment scrutiny has occurred. [Citations.]”

In the present case, we conclude defendant was not detained based on the following facts: Officer Luong did not use or display his gun as it remained in his holster; he did not shine a spotlight on defendant; he parked his patrol car in a driveway near where defendant was sitting, and the vehicle did not block defendant's ingress or egress; defendant was not physically restrained; defendant was not directed to move away from where he was sitting; and Officer Luong spoke to defendant in a "normal" rather than authoritative voice, when asking defendant what he was doing in the area.

Lastly, we note in passing that defendant's argument regarding involuntary consent fails as well. Defendant argues that in any event, the consent he gave Luong to search him or to "Go ahead" was invalid, because it was involuntarily rendered consent given solely in response to Luong's authority as a police officer.

The People carry the burden of establishing the consent given to search is voluntarily made, and unaffected by duress or coercion. (*Bumper v. State of North Carolina* (1968) 391 U.S. 543, 548-549.) The very facts which demonstrate the encounter between Luong and defendant was consensual, likewise allow the People to meet their burden of proof regarding voluntary consent.

Defendant's argument thus fails.

Substantial Evidence Supported the Finding Defendant Possessed a Dirk or Dagger

Defendant contends there was insufficient evidence to support the court's finding that he possessed a dirk or a dagger. He argues the prosecution failed to prove he intended to use the screwdriver for a felonious purpose, or for use as a stabbing weapon. We conclude the argument has no merit.

"In assessing a sufficiency-of-evidence argument on appeal, we review the entire record in the light most favorable to the prevailing party to determine whether it shows evidence that is reasonable, credible and of solid value from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Wader* (1993) 5 Cal.4th 610, 640.) We apply the same standard to convictions based

largely on circumstantial evidence. (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1745.) And, it is not within our province to reweigh the evidence or redetermine the issues of credibility. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Moreover, these same principles apply to proceedings pursuant to Welfare and Institutions Code section 602. (*In re Jesse L.* (1990) 221 Cal.App.3d 161, 165.)

Penal Code section 12020, subdivision (a)(4)(24) prohibits the carrying of a concealed dirk or dagger. Under the statute, a dirk or dagger is defined as a “knife or other instrument with or without a hand guard that is capable of ready use as a stabbing weapon that may inflict great bodily injury or death.” To be convicted, the defendant must (1) “knowingly and intentionally carry [the] concealed . . . instrument, and (2) know the instrument ‘is capable of ready use as a stabbing weapon.’” (*People v. Rubalcava* (2000) 23 Cal.4th 322, 332.) Proof of intent “to use the instrument as a stabbing weapon []” is not an element of the crime. (*Id.* at pp. 333-334.)

However, because the dirk or dagger portion of section 12020 criminalized what is traditionally lawful conduct, an element of knowledge must therefore be construed. “Thus, to commit the offense, a defendant must still have the requisite *guilty mind*: that is, the defendant must knowingly and intentionally carry concealed upon his or her person an instrument ‘that is capable of ready use as a stabbing weapon.’ [Citation.] A defendant who does not know that he is carrying the weapon or that the concealed instrument may be used as a stabbing weapon is therefore not guilty of violating section 12020.” (*People v. Rubalcava, supra*, 23 Cal.4th at p. 331.)

Here, substantial evidence supported defendant’s conviction. Officer Ackerman testified that the screwdriver found in defendant’s pocket had been physically modified. The screwdriver had been filed down to where the sides were uneven, and the end came to a point. Thus, it was the particular modification of the screwdriver which gave it the physical characteristics of a weapon capable of stabbing someone, and of inflicting harm.

Moreover, it is the way in which defendant responded to Ackerman's question regarding why he had the modified screwdriver in his possession, that speaks volumes. Instead of responding he did not know, or responding in any other manner, defendant gave Ackerman the rhetorical response "Come on man, you know why." This telling response leads us to reasonably conclude that defendant, who was alone in an area well-known for its gang activity, and who was sitting by a makeshift gang shrine, well knew that the modified screwdriver in his pocket could be used as a weapon if necessary.

Defendant's argument fails.

III

Disposition

The judgment is affirmed.